

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender, State of
Hawai‘i to the Commission to Improve Standards of Conduct**

November 9, 2022

DRAFT BILLS RELATING TO CRIMINAL LAW ENHANCEMENTS TO
ADDRESS PUBLIC CORRUPTION AND FRAUD

Chair Judge Daniel R. Foley (Ret.) and Members of the Commission:

Thank you for the opportunity to comment on the following draft bills relating to Criminal Law Enhancements to Address Public Corruption and Fraud:

- a. Proposed general fraud statute to cover schemes to defraud by means of false statements, misrepresentations, concealment of important information, or deception (Draft Bill relating to Fraud).
- b. Proposed statute establishing the offense of using or making false statements or entries in matters within the jurisdiction of the executive, legislative, or judicial branches of the state or counties (Draft Bill relating to Government (False Statements)).
- c. Proposed statute establishing the offense of making a false, frivolous, or fraudulent claim against the State or a county (Draft Bill relating to False Claims).

The Office of the Public Defender (OPD) supports the goals of the Commission to Improve Standards to restore public trust in state government and to increase the level of transparency in its operations and accountability of individuals. Our office also recognizes that to improve standards of conduct relating to combat fraud, waste, and corruption, it may be necessary to establish criminal offenses and penalties. Our office, however, has concerns regarding the penalties imposed for the foregoing bills.

Draft Bill Relating to Fraud

This measure imposes a mandatory indeterminate term of imprisonment of ten years with a mandatory minimum term of one year. The OPD opposes any measure that

strips sentencing judges of discretion and the ability to consider a broad range of options at sentencing.

Judges are subjected to a rigorous vetting process. A process that involves a roughly 40+ page judicial application, the Judicial Selection Committee interviewing and selecting, the Hawai'i State Bar Association interviewing and recommending, selection by either the Governor or the Chief Justice, and Senate confirmation. Judges are selected for their integrity, diligence, legal knowledge and ability, professional experience, judicial temperament, financial responsibility, public service, and their ability to fulfill the responsibilities and duties of the position. Judges should retain the power and authority to treat and consider each case on an individual basis. Judges should have the discretion to weigh mitigating factors as well as aggravating factors and to sentence the defendants that come before them accordingly. They are in a much better position to review a person's history, character, remorse, rehabilitative efforts, or lack thereof, family support etc.

Finally, not all conduct, which would constitute fraud, are the same, and therefore, should not be treated or punished the same. Certainly, conduct of a government employee claiming sick leave while not sick is not the same as conduct of former officials with the Honolulu International Airport involved in a bid-rigging scheme that spanned five years in which the head of the Airport Maintenance Section funneled repair work that needed to be done at the airport to specific contractors who overbilled the airport for their work. *See* Hawai'i Department of Attorney General [News Release No. 2006-34](#) issued October 27, 2006. The employee claiming unauthorized sick leave should not be punished the same as the airport officials. But, as currently written, the draft bill would subject both to mandatory prison sentences.

Draft Bills Relating to Government (False Statements) and False Claims

These measures would prohibit defendants originally charged with the offense of making a false, fictitious, or fraudulent claim against the State of Hawai'i or the county government from qualifying for a deferred acceptance of guilty or nolo contendere plea.

Again, the courts should be allowed to maintain their discretion on a case-by-case basis to grant deferral in these types of cases. Courts cannot exercise this discretion without meeting the requirements of HRS § 853-1, which provides, in pertinent part:

- (1) When a defendant voluntarily pleads guilty or nolo contendere, prior to commencement of trial, to a felony, misdemeanor, or petty misdemeanor; (2) It

appears to the Court that the defendant is not likely to engage in a criminal course of conduct; and

* * * *

(3) The ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court, without accepting the plea of nolo contendere or entering a judgment of guilt and with the consent of the defendant and after considering the recommendations, if any, of the prosecutor, may defer further proceedings.

If this measure passes, defendants charged with these offenses would be prohibited from requesting a deferral of their charges. As stated in HRS Chapter 853, the trial court, after considering the merits of the case, and hearing from the prosecutor, may or may not grant a defendant's motion to defer the proceedings. In order for the trial court to defer the proceedings, ***it must find that the defendant is not likely to re-offend or engage in a (further) course of criminal conduct, and that the ends of justice and welfare of society do not require the defendant receive a criminal conviction.***

Because of this high standard, the vast majority of requests by defendants to defer their criminal proceedings are ***not*** granted by the trial courts. Defendants must still be deemed worthy of a deferral. Criminal history, seriousness of the offense, history of substance abuse, lack of employment, and previous criminal behavior (even if uncharged) are common reasons cited to by prosecutors and judges for a denial of a defendant's motion to defer the acceptance of his or her guilty or no contest plea.

Why is it important that some defendants receive deferrals of their criminal proceedings? A criminal conviction follows an individual for the rest of his/her life. It will impact his/her ability to seek and maintain employment and to receive government benefits. A defendant who is youthful, immature, remorseful and is not likely to re-offend should be allowed, in limited circumstances, to be given the opportunity for a second chance -- a chance to avoid a criminal conviction.

Moreover, as previously stated, not all conduct, which would constitute the basis for a false statement or claim are the same. As stated above, a State government employee with no previous criminal record who has taken unauthorized sick leave should be eligible for a deferral under HRS Chapter 853.

Finally, it is simply unfair that a defendant who committed this offense (by taking unauthorized sick leave) is not eligible for a deferral while criminal defendants who

are charged with more serious offenses are eligible for a deferral. For example, defendants charged with the offenses of Robbery in the Second Degree (Class B felony), Theft in the First Degree (Class B felony, in which defendant is alleged to have stolen property valued over \$20,000), and Burglary in the First Degree (class B felony, in which a defendant is alleged to enter into a person's home unlawfully) are eligible.

Thank you again for the opportunity to comment on these proposed measures.